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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. RAFAEL AYALA KEY, Appellant.	)	2 CA-CR 2011-0147 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20101499001

Honorable Edgar B. Acuña, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Nicholas Klingerman
Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By Robert J. McWhirter
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K E L L Y, Judge.

¶1 Following a jury trial, Rafael Key was convicted of first-degree murder. The trial court sentenced him to life in prison with the possibility of parole after twenty-five years. On appeal, Key argues the state presented insufficient evidence of premeditation. We affirm.

¶2 "We view the facts and all reasonable inferences they permit in the light most favorable to sustaining the jury's verdict." *State v. Streck*, 221 Ariz. 306, ¶ 2, 211 P.3d 1290, 1290 (App. 2009). In March 2010, R.M., L.A., and R.L. were outside R.M.'s home talking when Key and his brother, O., arrived. As the state points out, L.A. and R.L. provided different accounts of what transpired next. According to L.A., O. and R.M. got into an argument, R.M. lunged at O., and the two men began fighting. Key produced a handgun and pointed it at L.A., which L.A. interpreted as a warning not to get involved. Key then walked to R.M., pressed the gun against his cheek, and fired once, killing him. In contrast, R.L. denied there had been any altercation. He stated that, after Key and O. had arrived, Key told R.M., "I was looking for you" and R.M. responded, "I'm here. You found me, do you have any problems with me?" Key then took out his gun and shot R.M. at close range.

¶3 We review de novo the sufficiency of the evidence to support Key's conviction. *See State v. West*, 226 Ariz. 559, 562, ¶ 15, 250 P.3d 1188, 1191 (2011). "'Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction.'" *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996), *quoting State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976). A conviction "may rest solely on circumstantial proof."

State v. Nash, 143 Ariz. 392, 404, 694 P.2d 222, 234 (1985). Premeditation likewise may be proved entirely by circumstantial evidence; it rarely can be proved by direct evidence. *See State v. Thompson*, 204 Ariz. 471, ¶ 31, 65 P.3d 420, 428 (2003). There was adequate evidence of premeditation here if the jury reasonably could conclude Key

> act[ed] with either the intention or the knowledge that he w[ould] kill another human being, when such intention or knowledge precede[d] the killing by any length of time to permit reflection. Proof of actual reflection is not required, but an act is not done with premeditation if it is the instant effect of a sudden quarrel or heat of passion.

A.R.S. § 13-1101(1); *see also State v. Ellison*, 213 Ariz. 116, ¶ 66, 140 P.3d 899, 917 (2006).

¶4 Key first asserts the state "provided no evidence of premeditation." We disagree. Under either scenario described above, there was ample evidence from which the jury could conclude that Key had reflected before killing R.M. Key's conduct in taking out his gun and placing it against R.M.'s face before pulling the trigger, standing alone, would permit the jury to conclude Key had committed premeditated murder. *See State v. Murray*, 184 Ariz. 9, 32, 906 P.2d 542, 565 (1995) (shooting victims "execution style" circumstantial evidence of premeditation). Furthermore, if the jury concluded there had been an altercation between O. and R.M., any inference that Key had acted in the heat of passion is contradicted by Key's conduct in first pointing the gun at L.A. before killing R.M. And, if the jury concluded there had been no altercation, the

evidence that Key told R.M. he had been looking for him[1] immediately before shooting him clearly would permit the jury to conclude that Key had arrived intending to kill R.M. *Cf. Thompson*, 204 Ariz. 471, ¶ 31, 65 P.3d at 428 (threats evidence of premeditation). Although Key cites several cases finding premeditation based on other facts, none suggest the evidence here was insufficient.

¶5 Key also argues that R.M. attacked him, not O., and Key only fired in response and that the shooting therefore was "nothing more than the instant effect of a sudden quarrel or heat of passion, which is not first[-]degree murder." Key's argument, however, finds scant support in the evidence. L.A. testified that Key and O. had arrived by car, that the driver of the car had been the one involved in an altercation with R.M., and that it was the passenger, whom L.A. identified as Key, who had shot R.M. in the face. Although O. testified he had been the passenger, and Key suggests this testimony means Key was the person with whom R.M. fought, we must view the evidence in the

[1]Key contends that, because the statement "appears to have been made contemporaneous[ly] with the shooting[,] . . . it does not show premeditation." We disagree. L.A.'s testimony was that R.M. had responded to Key's statement; thus, the exchange must have occurred before Key shot R.M. Key also asserts that, because L.A.'s testimony concerning that conversation was presented to impeach his earlier testimony that nothing had been said, "its validity" is "call[ed] . . . into question." The authority Key cites in support of this proposition suggests only that evidence admissible for impeachment might in some circumstances be excluded if it is unduly prejudicial. *See State v. Allred*, 134 Ariz. 274, 276-77, 655 P.2d 1326, 1328-29 (1982); *State v. Cruz*, 128 Ariz. 538, 540-41, 627 P.2d 689, 691-92 (1981). But the statement was introduced during Key's cross-examination of L.A. Thus, even if we agreed the evidence was unfairly prejudicial, any error was invited. *See State v. Logan*, 200 Ariz. 564, ¶ 9, 30 P.3d 631, 632-33 (2001) (court "will not find reversible error when the party complaining of it invited the error").

light most favorable to sustaining the verdict. *See Streck*, 221 Ariz. 306, ¶ 2, 211 P.3d at 1290.

¶6 For the reasons stated, Key's conviction is affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge